Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

DOUGLAS DOYLE ROBERTS,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether, under the Sixth Amendment Compulsory Process Clause, the Fifth and Fourteenth Amendment Due Process Clauses, and the Ninth Amendment to the Constitution of the United States and Article I Section 13 of the Idaho State Constitution, the Trial Court's ruling on Roberts' Motion in Limine, which forced him to make an election between not fully testifying, or becoming subject to extremely prejudicial and irrelevant impeachment evidence, improperly burdened Doug Roberts' fundamental right to testify in his own defense at trial, and to cross-examine and confront witnesses against him.

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OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

1. The Opinion of the Court of Appeals of the State of Idaho entered November 15, 1995, Opinion No. 101, Docket No. 20659, is unreported and appears in Appendix B.

2. The Opinion of the Supreme Court of the State of Idaho entered August 27, 1996, Opinion No. 111, Docket No. 22717, is unreported and appears in Appendix A.

3. The Order Denying Petition for Rehearing issued by the Supreme Court of the State of Idaho entered October 4, 1996, No. 22717, is unreported and appears in Appendix C.

STATEMENT OF BASIS FOR JURISDICTION

1. The Opinion of the Supreme Court of the State of Idaho, filed the 27th day of August, 1996, and the Opinion of the Idaho Court of Appeals, filed the 15th day of November, 1995, are in direct conflict with the decision of the Supreme Court of the State of Colorado in *Apodoca v. The People of the State of Colorado*, 712 P.2d 467, 469 (Colo. 1985) as Modified on Denial of Rehearing Jan. 27, 1986, and the decision in the United States District Court of the Southern District of New York in *Walker v. Hood*, 679 F.Supp. 372 (S.D. N.Y. 1988).

2. The Supreme Court of Idaho granted a review hearing of the Idaho Court of Appeals Opinion filed November 15, 1995. The Supreme Court issued its Opinion on Review on August 27, 1996. Finally, the Supreme

Court of the State of Idaho was asked to rehear their Decision and the Court issued an Opinion denying rehearing filed on the 4th day of October, 1996. These Decisions are in direct conflict with those cases cited in (1) above.

3. 28 U.S.C. Sections 1257 and 2101(b) confer jurisdiction on this Court to review, on a Writ of Certiorari, the Judgments and Orders referred to above.

4. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

STATEMENT OF THE CASE

An Information charging Sexual Abuse of a Child Under the Age of Sixteen, Idaho Code Section 18-1506, and Lewd and Lascivious Conduct with a Minor Under the Age of Sixteen, Idaho Code Section 18-1508, was filed against Roberts on September 2, 1992. The trial was held during the first week of February, 1993, and guilty verdicts on both Counts were returned on February 6, 1993.

The Court issued a written Opinion sentencing Roberts, which was filed on April 22, 1993. The sentence issued by the Honorable Daniel B. Meehl on Count I was life imprisonment with eligibility for parole after ten years, and on Count II, Roberts was sentenced to five years determinate. These sentences are running concurrently.

Roberts filed a Motion for New Trial on May 6, 1993. He filed a Notice of Appeal on June 2, 1993. A Motion for

Reconsideration was filed August 20, 1993. Various motions to stay the appeal were filed and granted, in order that the Motion for New Trial and Motion for Reconsideration could be joined with the appeal. The hearing on the Motions was held on January 5, 1994, before Honorable Daniel B. Meehl, and a Memorandum Opinion Denying In Part the Defendant's Motion for New Trial was filed February 7, 1994, with the confirming Order filed February 14, 1994.

Roberts' appeal focused on the propriety of the Trial Court's evidentiary ruling on a Motion in Limine with regard to his alibi evidence. Roberts could have presented alibi testimony to show that he was out of State at the time it was alleged he had been involved in uncharged sexual misconduct with three girls. These girls testified at trial about this alleged conduct in support of the State's case. The Trial Court ruled that if Roberts presented his alibi testimony, the State would be allowed to put before the trier-of-fact evidence that he actually spent the period of time in question incarcerated in Nevada on a prior offense of manslaughter.

Roberts filed an appeal with the Idaho Court of Appeals. On November 15, 1995, the Idaho Court of Appeals held that the trial "Court erred in holding that the State would be entitled to respond to Roberts' alibi testimony by introducing evidence of his prior incarceration" but that the error did not affect the verdict. (P, 2.) Therefore, the Idaho Court of Appeals affirmed the Trial Court's denial of Roberts' Motion for a New Trial.

Roberts filed an appeal with the Idaho Supreme Court. On August 27, 1996, the Idaho Supreme Court

issued its Opinion. The Idaho Supreme Court held that the Trial Court had erred in its evidentiary ruling on the Motion in Limine, but that the error constituted a harmless error. As a consequence, the Idaho Supreme Court affirmed the Decision of the Idaho Court of Appeals.

On September 26, 1996, Roberts filed a Petition for Rehearing with the Idaho Supreme Court. In this Petition, Roberts clearly framed the issue of the Trial Court's ruling on the Motion in Limine in constitutional, rather than evidentiary, terms. Roberts argued that the Trial Court's ruling put him on the "horns of an impermissible dilemma" by forcing him to choose between his alibi testimony and the introduction of the irrelevant, but extremely prejudicial, fact that he was incarcerated at the time of his alibi, which placed him out of the State of Idaho, and, therefore, that the Trial Court's error impermissibly "chilled" his fundamental right to testify, or have another person testify, at trial in his own defense under the Fifth, Fourteenth, and Ninth Amendments to the Constitution of the United States and Article I Section 13 of the Idaho State Constitution. On October 4, 1996, the Supreme Court of the State of Idaho denied the Petition for Rehearing.

As a consequence, Roberts is filing this Petition for Certiorari with the Supreme Court of the United States. Roberts respectfully requests that this Honorable Court review the Federal Constitutional issues raised by the Trial Court's erroneous evidentiary ruling on the Motion in Limine. This issue is of enhanced importance because the rulings of the Idaho State Courts appear to be in conflict with the Constitutional interpretations of the District Court of the Southern District of New York and the

Colorado Supreme Court, and such a jurisdictional discrepancy creates an intolerable degree of uncertainty for a defendant who wishes to exercise his or her fundamental right to testify and present evidence in his or her own defense.

REASONS FOR GRANTING THE WRIT

The Idaho Supreme Court's Opinion and the Idaho Court of Appeals Decision directly conflict with the decision of the Supreme Court of the State of Colorado in Apodoca v. The People of the State of Colorado, 712 P.2d 467, 469 (Colo. 1985) as Modified on Denial of Rehearing Jan. 27, 1986, and the decision in the United States District Court of the Southern District of New York in Walker v. Hood, 679 F.Supp. 372 (S.D. N.Y. 1988).

LEGAL ARGUMENT

Prior to his trial, Roberts filed a Motion in Limine to exclude the State's proferred evidence of alleged sexual abuse. The allegations of prior sexual abuse were to be given by three young girls. The State's case was based upon a foundation of apparent guilt which was constructed primarily on the girls' allegations, which in turn would lend invaluable support to the allegations of the alleged victim. The District Court granted Roberts' Motion as to one of the three girls, but the Court allowed the other two to testify at trial.

After the girls testified, Roberts wanted to impeach their testimony through the presentation of an alibi,

which would have expressed to the trier of fact that Roberts was definitely not within the State of Idaho from late 1988 through December, 1990, the same time within which the alleged abuse of at least two of the three girls would have occurred. In fact, Roberts was incarcerated at that time in Nevada for voluntary manslaughter. The District Court erroneously ruled that if Roberts testified in regard to his alibi, the State would then be permitted to elicit, before the jury, the highly prejudicial, irrelevant, and *inadmissible* fact of his incarceration and possibly the nature of the crime for which he had been incarcerated.

The Court's erroneous ruling put Roberts on the "horns of an impermissible dilemma." It forced him to choose between exercising his constitutional right to testify on his own behalf, and, thereby, subjecting himself to highly prejudicial and irrelevant evidence, which itself would almost certainly lead to his conviction, or not exercising his fundamental constitutional right to testify in regard to his alibi, and, thereby, facing almost certain conviction at the hands of a substantially uninformed, misguided, and prejudiced jury. In the end, Roberts chose not to testify in regard to his alibi and, as a consequence, he was convicted of Lewd Conduct with a Minor Under Sixteen.

Instead of only looking at this issue as an evidentiary ruling, it should also be reviewed within the parameters of a fundamental right being burdened. The Supreme Court of the United States has been very protective of a defendant's fundamental constitutional right to testify in his own defense. In *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972), the Court struck down a Tennessee statute that forced the defendant to testify

prior to any other testimony being heard by the defense, partially on the grounds that it violated the defendant's constitutional rights to testify and avoid self-incrimination.

In *Crane v. Kentucky*, 476 U.S. 683, 688, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636, 640 (1986), citing *California v. Trombetta*, 467 U.S. at 485, 104 S.Ct. at 2532 and *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984), the Court held that the Kentucky courts erred in refusing to allow the defendant to testify as to the environment in which he gave his confession, on the grounds that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Emphasis added. Roberts was denied opportunity to present a complete defense.

Finally, in *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the Court overruled the trial court's ruling pursuant to a State statute's per se exclusion of all hypnotically-refreshed testimony, on the basis that it impermissibly restricted the criminal defendant's fundamental constitutional right to testify on his or her own behalf.

The Supreme Court of Colorado rendered a decision for the defendant in a case which is substantially similar to the Roberts case. In *Apodoca v. The People of the State of Colorado*, 712 P.2d 467, 469 (Colo. 1985), the Colorado Supreme Court reversed the trial court's refusal to make a timely ruling on the defendant's motion to determine the admissibility of impeachment evidence; the trial court decided that it would only make the ruling when the

defendant actually testified. The Colorado Supreme Court in its ruling stated:

> . . . We conclude that the trial court impermissibly burdened the defendant's constitutional right to testify in his own defense by declining to rule on the constitutional admissibility of prior conviction evidence until such time as the defendant actually testified at trial and that such error cannot be deemed harmless under the present state of the record.

Id. at 469.

In addition, the Colorado Supreme Court went on to state:

> Under both the fourteenth amendment to the United States Constitution and [ ] [the State Constitution], a criminally accused has a due process right to testify in his own defense. This right is fundamental, and the opportunity to decide to exercise it freely and without coercive influence is critical to the fairness of the trial itself.
>
> A constitutional right may be said to be impermissibly burdened when there is some penalty for exercising that right. . . .
>
> . . .
>
> . . . The trial court deprived the defendant of that opportunity [the fundamental right to testify in his own defense] when it refused to rule on the defendant's motion to prohibit prosecutorial use of prior conviction evidence until such time as the prosecution actually sought to impeach the defendant with such evidence. In effect, the defendant could have testified in this

> case only by foregoing any opportunity to obtain in advance of actually taking the witness stand a judicial ruling on the most critical factor bearing on his decision whether to testify – that is the constitutional admissibility of his prior conviction for the purposes of impeachment. We conclude that the trial court's refusal to timely rule on the defendant's motion impermissibly burdened the defendant's right to testify in his own behalf, and that, given the present state of the record, we cannot treat this error as harmless.

Id. at 472-473.

Citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972); *People v. Curtis*, 681 P.2d 504 (Colo. 1984); *People v. Myrick*, 638 P.2d 34 (Colo. 1981); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *People v. Chavez*, 621 P.2d 1362 (Colo. 1981); *cert. denied sub nom; Colorado v. Chavez*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981); *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980); *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972); and *People v. Morrison*, 196 Colo. 319, 583 P.2d 924 (1978).

Roberts' dilemma is not only analogous to that of the defendant in *Apodoca v. People, supra*, 712 P.2d 467, but also more egregious. The Trial Court impermissibly burdened Roberts' fundamental constitutional right to testify by making an erroneous ruling, which applied an extremely coercive influence on Roberts' ultimate decision as to whether he would choose to exercise that right. The Trial Court's erroneous ruling forced Roberts to choose between testifying in regard to his alibi and,

thereby, subjecting himself to the highly prejudicial and irrelevant evidence of his incarceration and the nature of the crime for which he had been incarcerated, or foregoing testifying in regard to his alibi, and thereby weathering the tempest of multiple, unrefuted allegations of sexual misconduct. The Trial Court's erroneous ruling effectively put Roberts into a *"Catch-22"* situation, in which either the decision to exercise or not to exercise his fundamental constitutional right to testify would place him in peril of almost certain conviction.

The United States District Court of the Southern District of New York has upheld a defendant's fundamental constitutional right to testify in regard to his or her alibi. In *Walker v. Hood,* 679 F.Supp. 372 (S.D.N.Y. 1988), the Court overruled the trial judge's instruction to the jury to disregard the defendant's alibi regarding his whereabouts at the time of the crimes charged, and it ordered a new trial.

In the Opinion, the Court recognized the defendant's essential right to present his alibi testimony to the jury. The Court writes:

> The Court of Appeals for the Second Circuit has unequivocally recognized the right of an accused to testify in his own defense and to present his version of the events to the jury. This right is derived from the compulsory process clause of the Sixth Amendment and the due process requirements of the Fifth Amendment, applied to the states through the Fourteenth Amendment, and finds additional support in the Ninth Amendment.

> Not to be deprived of liberty without due process of law under the Fifth Amendment includes the right to a fair adversary process, a part of which is the right to be present and to take the witness stand in one's own defense. The right to testify on one's own behalf is also derived from the compulsory process clause of the Sixth Amendment. That Amendment, directed generally to the rights of the accused, includes an accused's right to call "witnesses in his favor." Logically included within the right to call any witness is the accused's right to testify himself should he possess evidence in favor of the defense. That this unmentioned right is a constitutional one is further fortified by the rule of construction contained in the Ninth Amendment. . . . The full scope of the specific guarantees is not limited by the text, but embraces their purpose to provide broad freedom from all "arbitrary impositions and purposeless restraints."

Id. 375-376.

Citing *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.), *cert. denied*, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983); and *United States v. Bentuena*, 391 F.2d 916, 943 (2d Cir.), *cert. denied*, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963).

> The accused's right to testify is implicated not only where he is totally precluded from taking the stand, but also if the scope of his testimony is restricted in any way.

Walker v. Hood, 679 F.Supp. 372, 376 (S.D.N.Y. 1988). Citing *United States v. Butts*, 630 F.Supp. 1145, 1148 (D. Me. 1986); *United States v. Walker*, 772 F.2d 1172, 1178 to n. 10 (5th Cir. 1985); *United States v. Bifield, supra*, 702 F.2d at 350; *Accord United States v. Brown*, 785 F.2d 587 (7th Cir. 1986); and *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir. 1982).

In the *Walker* case, defendant's alibi testimony may have placed him in a location other than the scene of the crime at the precise time of the crime. The prosecutor objected to the defendant's alibi testimony on the basis of his alleged failure to comply with a state notice of alibi statute. After the alibi testimony had been given and the trial concluded, the trial judge gave the jury a nullifying instruction in regard to the alibi testimony. The defendant argued on appeal that the trial court's erroneous instruction violated his constitutional rights and precluded his alibi testimony, which was crucial to his defense. *Walker v. Hood*, 679 F.Supp. 372 (S.D.N.Y. 1980).

The Court in *Walker, id.*, determined that the trial court's ruling and instruction were in error. In determining that the error was not a harmless error, because, when taken into consideration, the facts in evidence demonstrated that there was a reasonable possibility that the preclusion of the defendant's testimony affected the jury's verdict, the Court cited a previous opinion of the Second Circuit Court and wrote:

> In Escalera the court determined that preclusion of the alibi testimony offered by the defendant's brother could not be considered harmless error. The brother was prepared to testify that the defendant had been at home, showering and eating, for the half hour immediately preceding

> the crime charged. This testimony would have corroborated the defendant's own testimony, which was otherwise unsubstantiated. Recognizing that the jury might discount the testimony of a close relative, the court nevertheless determined that there was a reasonable possibility that the brother's testimony would have affected the verdict.

Id. at 382. Citing *Escalera v. Coombes*, 826 F.2d 185 (2d Cir. 1987).

Roberts' fundamental right to testify, under the Sixth, Fifth, Fourteenth, and Ninth Amendments to the United States Constitution and Article I Section 13 of the Idaho State Constitution, in regard to his alibi testimony, was also erroneously deprived by the decision of the Trial Court. Roberts' alibi testimony would have put him beyond the fatal grasp of at least two of the three girls' testimony of prior sexual abuse. However, by allowing the State to bring in the extremely prejudicial and irrelevant evidence of his incarceration and the nature of the crime for which he had been incarcerated, should he in fact have decided to choose to testify in regard to the alibi, the Trial Court effectively silenced Roberts' defense, and, thereby, led him down the path of almost certain conviction.

In this case, there is no question as to whether Roberts was truly outside the State of Idaho; no one disputes the simple fact that he was incarcerated in Nevada at the time. The question is not whether he was incarcerated, the question is whether the Trial Court impermissibly restricted Roberts' fundamental constitutional right to testify when it determined that the State's

attorney could tell the jury that Roberts was incarcerated and the nature of the crime for which he had been incarcerated, if he testified in regard to his alibi. It is certain that the Trial Court's ruling on this matter had a reasonable possibility of affecting the jury and, therefore, resulted in rendering the ultimate outcome of the trial fundamentally unfair. In fact, it is clear that the jury would have weighed the case against Roberts in a very different manner had it had the alibi evidence to off-set the girls' devastating testimony.

CONCLUSION

The Trial Court's erroneous ruling placed an impermissible restriction, if not an actual prohibition, on Roberts' fundamental constitutional right to testify in his own defense. If he chose to exercise his constitutional right in regard to his alibi and, thereby, submit to the jury the extremely prejudicial and irrelevant fact of his incarceration and the nature of the crime for which he had been incarcerated, he would have faced extreme risk of conviction. On the other hand, if, as did actually happen, he chose not to exercise his constitutional right to testify in regard to his alibi, he would squarely face the girls' uncontroverted allegations and, as a consequence, be convicted. In short, the Trial Court placed Roberts on the "horns of an impermissible dilemma;" a "*Catch-22*" which effectively deprived him of his fundamental constitutional right to testify in regard to his alibi.

In essence, Roberts would have been punished for testifying. Punishment for the exercise of a fundamental right requires reversal.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 22717

STATE OF IDAHO, Plaintiff-Respondent, v. **DOUGLAS DOYLE ROBERTS,** Defendant-Appellant.	**Lewiston, May 1996 Term** **1996 Opinion No. 111** **Filed: August 27, 1996** **Frederick C. Lyon, Clerk**

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Twin Falls County. Hon. Daniel B. Meehl, District Judge.

Appeal from order denying motion for a new trial, and from unified life sentence with a ten-year minimum period of confinement for lewd and lascivious conduct with a minor under sixteen, and a concurrent determinate five-year sentence for sexual abuse of a minor under sixteen. *Affirmed.*

Fuller & Williams, Twin Falls, for appellant. Timothy J. Williams argued.

Hon. Alan G. Lance, Attorney General; L. La Mont Anderson, Deputy Attorney General, Boise, for respondent. L. La Mont Anderson argued.

ON REVIEW

SILAK, Justice.

Douglas Doyle Roberts (Roberts) appeals from the denial of his new trial motion challenging the district court's evidentiary ruling that if he presented alibi evidence that he was out of state during the time period that three girls alleged prior uncharged molestations, the State would be permitted to show that Roberts spent this out of state time incarcerated in Nevada for a prior offense. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

Roberts was charged with lewd and lascivious conduct with a minor under sixteen pursuant to I.C. § 18-1508, and sexual abuse of a child under sixteen pursuant to I.C. § 18-506. The charges stemmed from Roberts' molestation of his step-granddaughter, S.H., when she was nine or ten years old. Roberts filed a motion in limine to exclude evidence proffered by the State that he committed sexual abuse against four other young girls. Three of the girls, B.H., A.H., and K.H., were also step-granddaughters of Roberts. The fourth girl, J.L., was the daughter of a woman with whom Roberts had once lived. The district court granted Robert's motion as to J.L., but allowed B.H., A.H., and K.H. to testify to experiences of sexual abuse by Roberts similar to that which he was charged with committing against S.H.

In order to impeach the testimony of the three girls, Roberts sought to have his wife testify that he was out of the state during the time period that the three girls

alleged the sexual abuse occurred. Although Roberts wished to present to the jury the fact that he was out of state, he did not want the jury to learn the reason for his absence. In fact, during the time period in question, late 1988 through December 1990, Roberts was in a Nevada prison serving a sentence for a voluntary manslaughter conviction. Roberts made a second motion in limine to preclude the State from presenting evidence concerning his incarceration in Nevada.

The district court ruled that if Roberts presented testimony that he was out of state from late 1988 to December 1990, the State would be permitted to elicit evidence that he was incarcerated during that time. The State would not, however, be permitted to divulge the fact that he was incarcerated for voluntary manslaughter. Thus, the district court's ruling requested Roberts to choose between (1) using his alibi evidence, with the prejudicial consequence that the jury would learn of the prior conviction, or (2) foregoing the alibi evidence, thereby relinquishing a potential means of impeaching the three girls who testified to uncharged molestations. Roberts elected to forego his alibi evidence so as to prevent disclosure of his past incarceration.

Following a guilty verdict on both counts, Roberts moved for a new trial arguing that he received ineffective assistance of counsel and that the evidentiary ruling impermissibly dissuaded him from presenting his alibi evidence. The district court acknowledged that its evidentiary ruling may have been incorrect, but concluded that a new trial was not warranted because it could not "be said to have probably changed the outcome of the

trial." The court also rejected Roberts' ineffective assistance of counsel claim.

Roberts was sentenced to serve a unified life sentence with a ten-year minimum confinement for the lewd and lascivious conduct conviction and a concurrent determinate term of five years imprisonment for the sexual abuse conviction. The district court denied Roberts' subsequent motion for a reduction of the sentences under I.C.R. 35.

Roberts appealed. The Court of Appeals affirmed the district court's denial of Roberts' motion for a new trial. We granted Roberts' petition for review.

II. ISSUES ON APPEAL

1. Whether the district court abused its discretion in denying Roberts' motion for a new trial.
2. Whether the district court abused its discretion in denying Robert's [sic] motion for reconsideration of sentence.

III. STANDARD OR REVIEW

This case comes before the Supreme Court on a petition for review of the Court of Appeals' decision. In such a case, the decision of the Court of Appeals is valued for the insight it provides in addressing the issues on appeal. *Spence v. Howell,* 126 Idaho 763, 768, 890 P.2d 714, 719 (1995). While we give serious consideration to the views expressed by the Court of Appeals, we review the opinion of the trial court directly. *Schiewe v. Farwell,* 125 Idaho 46, 49, 867 P.2d 920, 923 (1993).

IV. ANALYSIS

A. The District Court Did Not Abuse Its Discretion In Denying Roberts' Motion For A New Trial Based On Ineffective Assistance Of Counsel.

We can dismiss this issue summarily. Idaho Code Section 19-2406 sets forth the grounds upon which a new trial may be granted to a criminal defendant. Only those grounds provided can support the grant of a new trial. *State v. Gomez*, 126 Idaho 83, 86, 878 P.2d 782, 785 (1994), *cert. denied*, 115 S. Ct. 522 (1994). Because a claim for ineffective assistance of counsel is not one of the enumerated grounds, Roberts' allegation does not state a basis for a new trial under I.C. § 19-2406. *Gomez*, 126 Idaho at 86, 878 P.2d at 785. Roberts' ineffective assistance of counsel claim is more appropriately considered through an application for post-conviction relief. *Id.* Accordingly, the district court did not abuse its discretion in denying this portion of Roberts' motion for a new trial.

B. The District Court Correctly Denied Roberts' Motion For A New Trial Based On The Incorrect Evidentiary Ruling.

Unlike an ineffective assistance of counsel claim, a new trial may be granted where the trial court "has erred in the decision of any question of law. . . . " I.C. § 19-2406. As a result, Roberts' challenge of the district court's evidentiary ruling states a cognizable basis for the grant of a new trial under I.C. § 19-2406.

Having stated a claim cognizable under I.C. § 19-2406, the trial court may grant a new trial "if required in the interest of justice." I.C.R. 34. The grant or denial of a new trial is committed to the sound discretion of the trial court which this Court will not disturb absent an abuse of that discretion. *State v. Lankford,* 116 Idaho 860, 873, 781 P.2d 197, 210 (1989); *State v. Scroggins,* 110 Idaho 380, 384, 716 P.2d 1152, 1156 (1986). The trial court will not be found to have abused its discretion unless a new trial was granted for a reason not delineated in the code or unless the decision was "manifestly contrary to the interests of justice." *Lankford,* 116 Idaho at 873, 781 P.2d at 197.

We begin our analysis by inquiring into the propriety of the district court's evidentiary ruling. The district court concluded that it would be unfair to allow Roberts to elicit alibi testimony without allowing the State to establish that Roberts' absence from Idaho was due to the fact he was incarcerated in Nevada. Roberts claims that the district court's incorrect ruling placed him on the horns of an impermissible dilemma, *i.e.,* that he was forced to choose between (1) using his alibi evidence, with the prejudicial consequence that the jury would learn of the prior conviction, or (2) foregoing the alibi evidence, thus relinquishing an effective impeachment of the corroborating witnesses' allegations of uncharged sexual molestations. Roberts argues that evidence of his incarceration had no relevance for the purposes of proving the case against him, and to the extent that it had any relevance, the evidence should have been excluded under I.R.E. 403 because its probative value was substantially outweighed by its unfair prejudicial impact.

Relevant evidence is evidence which has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Evidence of Roberts' incarceration would not have made more probable any element of the State's case against him. Rather than undermining Roberts' alibi, evidence of his incarceration in Nevada during the relevant time period would have strengthened it. Thus, no prejudice to the State would have resulted from the jury being uninformed about the reason behind Roberts' absence from Idaho. Further, the fact of his incarceration would only have impermissibly invited the jury to infer that Roberts had a criminal propensity and that he was more likely to have committed the offenses charged in the present case. The admission of evidence for such a purpose is strictly prohibited by I.R.E. 404. Accordingly, we agree that the fact of Roberts' incarceration was not relevant to any element of the State's case against him, and conclude the district court erred in denying Roberts' motion to exclude evidence concerning his imprisonment in Nevada.

Having so concluded, we must now determine whether this error required that Roberts be granted a new trial. Roberts contends that had he been allowed to present his alibi evidence to impeach the three girls' testimony regarding the uncharged acts of sexual abuse, the jury would have questioned the veracity of S.H. and that an acquittal probably would have resulted.[1] The district

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[1] Roberts does not contest the admissibility of the three witnesses' testimony for purposes of corroborating the victim's

court ruled that any error resulting from its incorrect evidentiary ruling "cannot be said to have probably changed the outcome of the trial."

In order to determine whether the district court should have granted Roberts' motion for a new trial, we must decide whether the court's incorrect evidentiary ruling on the alibi constituted harmless or reversible error. I.C.R. 52 provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." In determining whether an error has affected a defendant's substantial rights, this Court must ask whether it appears, beyond a reasonable doubt, "that there was no reasonable possibility that the error contributed to the conviction." *State v. Roy*, 127 Idaho 228, 231, 899 P.2d 441, 444 (1995); *State v. Sharp*, 101 Idaho 498, 507, 616 P.2d 1034, 1043 (1980).

K.H., the oldest of the three witnesses and sixteen at the time of the trial, was the only witness of the three who gave definitive testimony as to the time when her alleged abuse took place. While not stating the exact year, she testified that Roberts abused her three years prior to the trial. The prosecutor then asked if it had occurred in "1989 roughly," and K.H. answered affirmatively. B.H., fifteen at the time of the trial, testified that Roberts

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testimony. In *State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (1991), this Court held that in a trial for a sex offense against a seven-year-old girl, evidence of similar offenses against similar victims was admissible to show a general plan to exploit and sexually abuse an identifiable group of young girls and to corroborate the victim's testimony. *See also, State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993), and *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992).

abused her more than three years prior to the trial. The trial occurred in February 1993. A.H. testified that she could not remember when Roberts allegedly touched her inappropriately. The impeachment evidence as to Roberts' absence from the state of Idaho from late 1988 through 1990 would have therefore potentially impeached only one of the witnesses, K.H., as to the time frame of the alleged inappropriate touching. Such evidence would not have impeached other aspect's [sic] of K.H.'s testimony, including where the molestation took place and the nature of the alleged touching.

K.H.'s testimony regarding her alleged molestation was impeached through one of the witnesses that the defense called on rebuttal, Craig Carroll. Carroll was a sergeant on the Kimberly police department. He assisted the Department of Health and Welfare in interviewing both K.H. and A.H. regarding their molestation charges against Roberts. Carroll's testimony regarding what K.H. told him differed from that of the witness herself. He stated that he had interviewed her in 1989, and that she had told him Roberts had touched her in the buttocks area. At trial, K.H. testified that the alleged touching involved her breasts. Carroll also stated that she had said nothing had happened in Twin Falls county or in Kimberly, but that "something might have happened in Nevada." At trial, K.H. testified that the alleged molestation had happened at the home of her grandmother, which the jury knew was located in Twin Falls county. Finally, Carroll stated that no charges were filed against Roberts as a result of the investigation into the molestation allegations of K.H. and A.H.

Carroll's testimony provided impeachment of K.H.'s testimony in several important respects: the nature of the touching and the location of the touching. He also testified that no charges were brought against Roberts, which also indirectly impeaches K.H. Thus, when K.H.'s testimony is viewed in the light of the rebuttal testimony of Carroll, we conclude beyond a reasonable doubt that there was not a reasonable possibility that the exclusion of the Nevada alibi evidence contributed to Roberts' conviction.

Additionally, it is important to note that the testimony of S.H., the victim herself, would not have been impeached by the alibi evidence. The time frame of S.H.'s testimony related to 1991 and 1992.

Based upon the above analysis of the record, we conclude that the district court did not err in denying the motion for a new trial. We are convinced beyond a reasonable doubt that there was not a reasonable possibility that the error in excluding the alibi evidence contributed to Roberts' conviction. *Cf. State v. Seitter,* 127 Idaho 356, 359, 900 P.2d 1367, 1370 (1995).

C. The District Court Did Not Abuse Its Discretion In Denying Roberts' Motion For Reconsideration Of His Sentence.

The district court imposed a unified life sentence with a minimum term of ten years' confinement for the lewd and lascivious conduct conviction and a concurrent determinate sentence of five years for the sexual abuse conviction. On appeal, Roberts argues that the inability to

make use of the alibi evidence at trial tainted his sentencing in that the district court relied on the testimony of the three witnesses in concluding that Roberts presented a danger to society. We find this argument to be without merit. First, the alibi did not have the impeachment force attributed to it by Roberts, and the alibi evidence was known to the district court. This evidence was not excluded at sentencing. Thus, the erroneous evidentiary ruling that deterred Roberts from presenting his alibi evidence at trial had no effect on the outcome at sentencing.

Additionally, contrary to Roberts' assertion, it was proper for the district court to consider the three witnesses' testimony in determining Roberts' sentences. A sentencing court may consider a wide range of information when determining an appropriate sentence, including consideration of a defendant's alleged criminal activity even if no charges have been filed. *State v. Coffin*, 104 Idaho 543, 548-49, 661 P.2d 328, 333-34 (1983); *State v. Ott*, 102 Idaho 169, 170, 627 P.2d 798, 799 (1981).

Roberts next contends that his sentences were excessive. In determining whether a sentence is excessive, we review it for abuse of the district court's discretion. A legal sentence will not be disturbed on appeal unless it is unreasonably harsh in view of the sentencing objectives of protecting society, deterrence, rehabilitation and retribution. *State v. Broadhead*, 120 Idaho 141, 146, 814 P.2d 401, 406 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992).

In order to show that the district court abused its discretion by imposing the sentence that it did, Roberts

must show that the sentence was unreasonable upon the facts of the case. *Broadhead,* 120 Idaho at 145, 814 P.2d at 405. The reasonableness of a sentence is determined by looking to the probable length of confinement. *Id.* In reviewing a sentence imposed under the Unified Sentencing Act, the probable length of confinement is the fixed portion of the sentence. *Id.* at 146, 814 P.2d at 406. Thus, this Court must determine whether the minimum sentence of ten years for lewd and lascivious conduct with a minor under sixteen and the concurrent five-year term for sexual abuse of a minor under sixteen were unreasonable in Roberts' case.

We conclude that Roberts has not demonstrated that the sentences are excessive under any reasonable view of the facts. Having reviewed the record, we find no fault in the district court's conclusion that the minimum terms were necessary because there was an undue risk that Roberts would commit other, similar offenses and because lesser sentences would belittle the seriousness of the crimes.

Finally, in response to Roberts' argument that the district court erred in denying his motion for reduction of the sentences pursuant to I.C.R. 35, the State argues that due to the district court's delay in ruling upon the motion until some eighteen months after it was filed, the district court lost jurisdiction to grant the motion, regardless of the merits. We conclude that the Court need not pass upon this jurisdictional question, however, because Roberts has made no additional argument in support of his Rule 35 motion other than those which we have already considered and rejected above in connection with

his appeal of the sentences. We thus affirm the denial of Roberts' Rule 35 motion.

V. CONCLUSION

We hold that the district court did not abuse its discretion in denying Roberts' motion for a new trial based upon his ineffective assistance of counsel argument because this claim is not one of the enumerated grounds for a new trial under I.C. § 19-2406.

We further hold that the district court correctly denied Roberts' motion for a new trial based upon the incorrect evidentiary ruling. While the district court erred in its ruling on the admissibility of Roberts' alibi evidence, it was harmless error.

Finally, we hold that Roberts' sentences were not excessive and the denial of the Rule 35 motion is affirmed.

The judgment of conviction and the sentences imposed are affirmed.

Chief Justice McDEVITT, Justices JOHNSON, TROUT and SCHROEDER, **CONCUR.**

IN THE COURT OF APPEALS
OF THE STATE OF IDAHO

Docket No. 20659

STATE OF IDAHO, Plaintiff-Respondent, v. DOUGLAS DOYLE ROBERTS, Defendant-Appellant.	)	1995 Opinion No. 101 Filed: November 15, 1995 Frederick C. Lyon, Clerk

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. Daniel B. Meehl, District Judge.

Order denying motion for new trial, *affirmed*; unified life sentence with ten-year minimum period of confinement for lewd and lascivious conduct with a minor under sixteen, and determinate five-year sentence for sexual abuse of a minor under sixteen, *affirmed*.

Fuller & Williams, Twin Falls, for appellant. Greg J. Fuller argued.

Hon. Larry EchoHawk, Attorney General; L. LaMont Anderson, Deputy Attorney General, Boise, for respondent. L. LaMont Anderson argued.

LANSING, Judge

Douglas Doyle Roberts was found guilty by a jury of lewd and lascivious conduct with, and sexual abuse of, his granddaughter, S.H. At the trial, the State presented

the testimony of three other girls who said that Roberts had also molested them. By this appeal we are asked to determine the propriety of an evidentiary ruling by the district court that dissuaded Roberts from presenting alibi evidence which, he contends, would have impeached the three girls' testimony about prior uncharged molestations. The district court ruled that if Roberts presented alibi testimony to show that he was out of state at the time of the alleged uncharged misconduct, the State would be permitted to elicit evidence that Roberts spent this out-of-state time incarcerated in Nevada for a prior offense. Because of this ruling, Roberts elected to forego presenting the alibi evidence. After the jury rendered a guilty verdict, Roberts moved for a new trial based in part upon alleged error in the court's ruling that deterred use of the alibi evidence. This motion was denied. Roberts appeals from the denial of his motion for a new trial. We conclude that the court erred in holding that the State would be entitled to respond to Roberts' alibi testimony by introducing evidence of his prior incarceration, but because we are persuaded that this error did not affect the verdict, we affirm the order denying a new trial. The sentences imposed by the district court are also affirmed.

I.

FACTS AND COURSE OF PROCEEDINGS

Roberts was charged with lewd and lascivious conduct with a minor under sixteen, I.C. § 18-1508, and sexual abuse of a child under sixteen, I.C. § 18-1506. Both charges stemmed from his molestation of S.H. when she

was nine or ten years old. Just prior to trial, Roberts filed a motion in limine to exclude the State's proffered evidence of alleged previous sexual abuse committed by Roberts against four other young girls. Each of these girls was prepared to relate experiences of sexual abuse by Roberts similar to that which he was charged with committing against S.H. The district court granted Roberts' motion as to only one of the four witnesses, and the State was allowed to present the testimony of the remaining three girls, who will be referred to herein for convenience as the "corroborating witnesses".[1]

Following the district court's determination that the corroborating witnesses' testimony would be admitted, Roberts advised the court that he wanted to impeach their testimony by having his wife testify that Roberts was out of state from late 1988 through December 1990. This evidence, Roberts contended, would show that he was not even in the same state with the corroborating witnesses when the sexual abuse of these witnesses allegedly occurred. Roberts asserted that his alibi as to these uncharged acts was "airtight" because he was in a Nevada prison during this time period. Although Roberts

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[1] In *State v. Moore*, 120 Idaho 743, 819 P.2d 1143 (1991), the Idaho Supreme Court held that in a trial for a sex offense against a seven-year-old girl, evidence of similar offenses against similar victims was admissible to show a general plan to exploit and sexually abuse an identifiable group of young girls and to corroborate the victim's testimony. *See also State v. Phillips*, 123 Idaho 178, 845 P.2d 1211 (1993) and *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992). Roberts does not dispute that the corroborating witnesses' testimony was admissible for such purposes.

wished to present his wife's testimony that he was not living in Idaho at the time of the alleged uncharged molestations, he understandably did not want the jury to learn of his prior imprisonment. Therefore, Roberts filed a second motion in limine seeking to preclude the State from presenting evidence that Roberts had been incarcerated at the time in question.

On this second motion in limine, the district court held that if Roberts presented the testimony that he was out of state from late 1988 through December 1990, the State would be permitted to elicit the fact that he was "in jail" during that time, though it could not divulge the nature of the crime for which Roberts was incarcerated.[2] As a consequence of this ruling, and in order to prevent disclosure of his past incarceration, Roberts elected to forego presenting his alibi evidence.

Following a guilty verdict, Roberts filed a motion for a new trial. As grounds for a new trial, Roberts argued that he received ineffective assistance of counsel at his trial and that the court erred in its holding that Roberts' incarceration in Nevada could be disclosed to the jury if he presented the alibi evidence. In ruling on the motion for a new trial, the district court acknowledged that it may have been mistaken in holding that Roberts' use of his alibi to impeach the corroborating witnesses would entitle the State to disclose his incarceration in Nevada. Nonetheless, the court found that a new trial was not warranted because, even if Roberts' alibi evidence had

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[2] Roberts had been convicted in Nevada for voluntary manslaughter.

been presented without any reference to his past incarceration, the jury verdict would have been the same. Roberts' claim that he was entitled to a new trial on the ground of ineffective assistance of counsel was also rejected.

The district court sentenced Roberts to serve a unified life sentence with a ten-year minimum term of confinement for the lewd and lascivious conduct conviction and a concurrent determinate term of five years' imprisonment for the sexual abuse conviction. Roberts subsequently filed a motion under I.C.R. 35 for reduction of the sentences, which was denied.

On appeal, Roberts challenges the denial of his motion for a new trial, his sentences, and the denial of his Rule 35 motion.

II.

ANALYSIS

A. Motion for a New Trial Based on Ineffective Assistance of Counsel

Roberts' claim that he was entitled to a new trial due to ineffective assistance of counsel at the initial trial does not detain us long, for this claim does not state a permissible basis for a new trial. The grounds upon which a new trial may be granted to a criminal defendant are set forth

in I.C. § 19-2406,[3] and ineffective assistance of trial counsel is not one of the delineated grounds. A new trial may not be ordered for a reason other than those specified in Section 19-2406. *State v. Lankford*, 116 Idaho 860, 873, 781 P.2d 197, 210 (1989), *cert. denied*, 497 U.S. 1032 (1990). Consequently, an allegation of ineffective assistance of

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[3] Idaho Code Section 19-2406 provides:

When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:

1. When the trial has been had in his absence, if the indictment is for a felony.

2. When the jury has received any evidence out of court other than that resulting from a view of the premises.

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors.

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial.

6. When the verdict is contrary to law or evidence.

7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

counsel does not state a basis for a new trial. *State v. Gomez*, ___ Idaho ___, 878 P.2d 782, 785-86 (1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 522, 130 L.Ed.2d 427 (1994). Such claims may appropriately be presented through an application for post-conviction relief. *Id.; State v. Mitchell*, 124 Idaho 374, 375-76, 859 P.2d 972, 973-74 (Ct. App. 1993). It follows that the trial court did not abuse its discretion in denying this aspect of Roberts' motion for a new trial.

B. Motion for a New Trial Based on Evidentiary Ruling.

Roberts next asserts that he is entitled to a new trial because the district court erred in holding that evidence of Roberts' incarceration in Nevada could be presented by the State if Roberts introduced his alibi evidence. One of the grounds for a new trial specified in I.C. § 19-2406 is an error by the court "in the decision of any question of law arising during the course of the trial." I.C. § 19-2406(5). Roberts' contention that the trial court committed error in its evidentiary ruling asserts an error in deciding a question of law and therefore states a basis for a new trial cognizable under I.C. § 19-2406.

Where one of the statutory grounds is demonstrated, the court may grant a defendant's motion for a new trial "if required in the interest of justice." I.C.R. 34; *Lankford*, 116 Idaho at 873, 781 P.2d at 210. Whether to grant or deny a new trial is a discretionary matter for the trial court. *State v. Dambrell*, 120 Idaho 532, 543, 817 P.2d 646, 657 (1991); *State v. Scroggins*, 110 Idaho 380, 384, 716 P.2d 1152, 1156 (1986), *cert. denied*, 479 U.S. 989 (1986). Because

Roberts has framed his appeal as an appeal from the denial of his motion for a new trial rather than as a direct challenge to the court's ruling on his motion in limine, we must employ the standard of review applicable to decisions on new trial motions. The action of the trial court in granting or denying a motion for a new trial will be reviewed for an abuse of discretion. *State v. Powers*, 100 Idaho 290, 596 P.2d 802 (1979). The trial court will not be found to have abused its discretion unless a new trial was granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial was manifestly contrary to the interests of justice. *State v. Davis*, ___ Idaho ___, 896 P.2d 970, 973 (1995); *Lankford*, 116 Idaho at 873, 781 P.2d at 210.

Since Roberts' predicate for a new trial is a claimed error in the district court's evidentiary ruling, our review must begin with an examination of that ruling to determine if it was incorrect. If we find error in the district court's decision to permit disclosure of Roberts' incarceration in Nevada if Roberts introduced his alibi evidence, we must then consider whether, in view of that error, the denial of a new trial was manifestly contrary to the interests of justice.

In ruling on Roberts' motion in limine, the district court concluded that it would be unfair to allow Roberts to elicit the alibi testimony from his wife without allowing the State on cross-examination to establish that Roberts' absence from Idaho during the subject two-year period was due to his incarceration. Roberts argues that the evidence of his imprisonment had no relevance for purposes of proving the State's case against him and, to the extent that it had any relevance, the evidence should

have been excluded under I.R.E. 403[4] because its probative value was substantially outweighed by the unfair prejudicial impact of informing the jury that Roberts had a prior conviction. Roberts complains that the court's erroneous ruling placed him on the horns of an impermissible dilemma: he was forced to choose between (1) using his alibi evidence, with the prejudicial consequence that the jury would learn of the prior conviction, or (2) foregoing the alibi evidence, thereby relinquishing an effective impeachment of the corroborating witnesses' allegations of uncharged sexual molestations.

We agree with Roberts that the trial court's ruling on this evidentiary issue was incorrect. The fact that Roberts was imprisoned in Nevada during the subject two-year interval was not relevant to prove any element of the State's case against Roberts. Evidence is "relevant" if it has "any tendency to make the existence of any fact of consequence to determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Evidence regarding Roberts' incarceration in Nevada would not have made more probable any fact that the State sought to prove against Roberts. It clearly would not have undermined Roberts' alibi, but, to the contrary, strengthened it. Thus, no prejudice would have befallen the State from the jury's

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[4] Idaho Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if it probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

remaining uninformed of the reason for Roberts' absence from the State of Idaho. The evidence of Roberts' past imprisonment would have benefitted the State only to the extent that the jury might have inferred therefrom that Roberts was a person of poor character or one with criminal propensities, and therefore was more likely to have committed the offenses charged in the present case. Admission of evidence for such a purpose, however, is prohibited by I.R.E. 404.[5] Accordingly, the district court committed an error of law when it denied Roberts' motion to exclude evidence of his imprisonment in Nevada, and Roberts should have been permitted to present his alibi evidence without the attendant consequence that his past incarceration would be revealed to the jury.

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[5] Idaho Rule of Evidence 404 provides in pertinent part:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
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> > (1) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same.
> >
> > . . . .
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of notice, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Having found this error in the trial court's evidentiary ruling, we must next consider whether the trial court was correct in holding that the error did not necessitate a new trial in the interest of justice. Roberts argues that, had he been allowed to present his "airtight" alibi, the jury would have disbelieved the corroborating witnesses' testimony regarding uncharged acts of sexual abuse, that this effective impeachment of the corroborating witnesses would have led the jury to question the veracity of S.H., and that an acquittal probably would have resulted. The district court, on the other hand, concluded that any error in its evidentiary ruling which deterred Roberts from using his alibi evidence "cannot be said to have probably changed the outcome of the trial."

Roberts' claim that a new trial is necessary because the defendant was effectively precluded from presenting probative evidence by an erroneous trial court ruling is analogous to a request for a new trial based upon newly discovered evidence. In both situations the motion is predicated upon the defendant's inability to present at trial probative evidence favorable to the defense. Therefore, we think it appropriate in evaluating Roberts' claim to apply standards similar to those used where the motion is posited upon newly discovered evidence. In the latter context, a four-part test has been articulated to define when the new evidence will justify a retrial. The movant must show:

> (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that the

> failure to learn of the evidence was due to no lack of diligence on the part of the defendant.

State v. Drapeau, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976). *See also State v. Pugsley*, 119 Idaho 62, 63, 803 P.2d 563, 564 (Ct. App. 1991); *State v. Ames*, 112 Idaho 144, 146, 730 P.2d 1064, 1066 (Ct. App. 1986). The first and fourth elements of this test are inapplicable where, as here, the evidence was available but was not presented due to trial court error. The second and third elements are, however, properly applied in the present circumstance.

Whether element number two is satisfied by Roberts' proffered alibi evidence is subject to debate. The evidence would have been material and not cumulative. Arguably, however, it was useful only for impeachment purposes. Impeachment evidence is that which is offered to attack the credibility of a witness rather than to establish the existence or non-existence of a disputed fact. *Pugsley*, 119 Idaho at 63, 803 P.2d at 564. The alibi testimony might be viewed as only impeachment because its purpose was to discredit the State's witnesses on collateral issues not bearing directly upon the commission of the charged offenses. On the other hand, the State offered the corroborating witnesses' testimony to prove that uncharged molestations occurred, and Roberts' alibi evidence is intended to disprove those molestations. The alibi evidence therefore is arguably offered to establish the non-existence of a disputed fact and is not purely for impeachment. For purposes of this analysis, we will resolve this debate in Roberts' favor and will assume that the second element articulated in *Drapeau, supra*, is satisfied.

Nonetheless, we conclude that justification for a new trial has not been demonstrated because Roberts' alibi evidence does not withstand scrutiny under the third element – that the evidence would probably produce an acquittal. Although Roberts contends that all three witnesses who testified to collateral incidents of sexual abuse would have been impeached by his alibi evidence, close examination of their testimony shows that there was potential for impeachment of only one of the witnesses. Just one of the corroborating witnesses indicated that the alleged abuse occurred during the period between late 1988 and December 1990, when Roberts was in prison. Of the two remaining witnesses, one stated that the abuse occurred more than three years prior to the February 1993 trial, but she could not otherwise narrow the time frame. Thus, the molestation to which she testified could have occurred long before Roberts' imprisonment, and her testimony would not have effectively been impeached by his alibi. Roberts' alibi would have been equally ineffective to discredit the third girl, for she was never able to make any estimate as to when the abuse occurred. Thus, Roberts' evidence that he was out of state from late 1988 through 1990, if presented, would not have been the definitive impeachment tool he portrays and would not have undermined the credibility of two of the three corroborating witnesses. It must also be borne in mind that the testimony of S.H., the victim in this case, would not have been discredited in any respect by the alibi testimony. In light of these limitations on the value of Roberts' unpresented alibi testimony, and considering the totality of the evidence in the case, we agree with the district court's assessment that presentation of the alibi

evidence would not have changed the jury's verdict. Accordingly, we conclude that the trial court's denial of Roberts' motion for a new trial was not manifestly contrary to the interests of justice and not an abuse of discretion.

III.

SENTENCING

The district court imposed a unified life sentence with a minimum term of ten years' confinement for the lewd and lascivious conduct conviction and a determinate sentence of five years for the sexual abuse conviction. On appeal, Roberts contends that his sentencing was tainted by his inability to make use of the alibi evidence at trial. At the sentencing hearing, the district judge expressed his view that Roberts presented a danger to society. Roberts argues that this conclusion was based in part upon the claims of the three corroborating witnesses, which he was prevented from impeaching at trial. Roberts asserts that, "it is impossible to ascertain how the court *may* have exercised its discretion in sentencing had the witnesses' testimony been discredited at trial by the real but unusable alibi. . . . "

We find this argument fallacious. First, as noted above, the so-called alibi did not come close to carrying the impeachment force attributed to it by Roberts, for it would have, at most, contradicted only one of the three corroborating witnesses. More importantly, the alibi information, although unknown to the jury at trial, was not unknown to the sentencing judge. That evidence was not excluded at sentencing, and the defendant's attorney

did, in fact, argue at the sentencing hearing that the three corroborating witnesses' testimony was not worthy of belief in light of Roberts' period of incarceration in Nevada. Thus, the erroneous evidentiary ruling that dissuaded Roberts from presenting his alibi evidence at trial had no effect whatsoever at the sentencing hearing.

Roberts is also incorrect in asserting that the district court should not have considered the testimony of the corroborating witnesses when fashioning Roberts' sentences. A sentencing judge may properly consider a wide range of information in determining the appropriate sentence for a defendant. This includes consideration of the defendant's past criminal history and, with due caution, consideration of the defendant's alleged criminal activity for which no charges have been filed. *State v. Coffin*, 104 Idaho 543, 548, 661 P.2d 328, 333 (1983); *State v. Ott*, 102 Idaho 169, 627 P.2d 798 (1981); *State v. Barnes*, 121 Idaho 409, 411, 825 P.2d 506, 508 (Ct. App. 1992); *State v. Paz*, 112 Idaho 407, 732 P.2d 376 (Ct. App. 1987). The district court was entitled to consider the evidence of uncharged molestations of children other than S.H., and the credence to be attached to that evidence, in fashioning Roberts' sentences.

Next, Roberts contends that his sentences were excessive. When a sentence is challenged on appeal, we must review it for abuse of the sentencing court's discretion. Where a sentence is not illegal, it will be disturbed on appeal only if it is unreasonably harsh in view of the sentencing objectives of protecting society, deterrence, rehabilitation and retribution. *State v. Broadhead*, 120 Idaho 141, 146, 814 P.2d 401, 406 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482

(1992); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). In order to establish that the sentence was an abuse of the trial court's discretion the defendant must show that the sentence was excessive under any reasonable view of the facts. *Broadhead*, 120 Idaho at 145, 814 P.2d at 405. We base our appellate review on the probable length of confinement. For sentences imposed under the Unified Sentencing Act, I.C. § 19-2513, the probable length of confinement is the minimum period of incarceration imposed by the sentencing judge. *State v. Sanchez*, 115 Idaho 776, 769 P.2d 1148 (Ct. App. 1989). Thus, we must determine whether the minimum sentence of ten years for lewd and lascivious conduct with a minor under sixteen and the five-year term for sexual abuse of a minor under sixteen were unreasonable in Roberts' case.

After hearing the evidence and argument presented at sentencing, the district court concluded that the minimum terms imposed were necessary because there is an undue risk that Roberts will commit other, similar offenses and because lesser sentences would depreciate the seriousness of the crimes. Having thoroughly reviewed the record, we find no fault in the district court's perception. Roberts has not demonstrated that the sentences are excessive under any reasonable view of the facts.

Finally, Roberts argues that the district court erred in denying his motion for reduction of the sentences pursuant to I.C.R. 35. The state responds that due to the trial court's delay in ruling upon Roberts' request for Rule 35 relief until some eighteen months after the motion was filed, the court lost jurisdiction to grant the motion, regardless of its merits. We need not pass upon this

jurisdictional question, however, because Roberts has made no argument in support of his Rule 35 motion other than those we have already considered and rejected above in reviewing his sentences and the sentencing proceedings.

IV.

CONCLUSION

The district court's decision denying Roberts' motion for a new trial is affirmed, as are the sentences imposed.

Chief Judge WALTERS and Judge PERRY CONCUR.

APPENDIX C

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent, v. DOUGLAS DOYLE ROBERTS, Defendant-Appellant.	ORDER DENYING PETITION FOR REHEARING NO. 22717 Ref. No. 96RH-26

The appellant having filed a PETITION FOR REHEARING on September 16, 1996 and supporting BRIEF on September 27, 1996 of the Court's Opinion released August 27, 1996; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 4th day of October, 1996.

By Order of the Supreme Court

/s/ Lois Dawson
Lois Dawson, Chief Deputy
Clerk for Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Daniel B. Meehl